REDACTED DECISION – DOCKET NUMBERS 12-477 RMFE, 13-278 M

BY A.M. "FENWAY" POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON AUGUST 15, 2014 – ISSUED ON JANUARY 23, 2015.

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

SYNOPSIS

TAXATION
SUPERVISION
GENERAL DUTIES AND POWERS OF COMMISSIONER; APPRAISERS

It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

TAXATION
WEST VIRGINIA TAX PROCEDURE AND ADMINISTRATION ACT
COLLECTION OF TAX

"The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable." W. Va. Code Ann. § 11-10-11(a) (West 2010).

TAXATION
USE TAX
IMPOSITION OF TAX; SIX PERCENT RATE; INCLUSION OF SERVICES AS TAXABLE; TRANSITION RULES; ALLOCATION OF TAX AND TRANSFERS

"An excise tax is hereby levied and imposed on the use in this state of tangible personal property, custom software or taxable services, to be collected and paid as provided in this article or article fifteen-b of this chapter, at the rate of six percent of the purchase price of the property or taxable services, except as otherwise provided in this article." W. Va. Code Ann. § 11-15A-2(a) (West 2014).

TAXATION
USE TAX
TAX ON MOTOR FUEL EFFECTIVE JANUARY 1, 2004

Computation of tax due from motor carriers.--Every person who operates or causes to be operated a motor carrier in this state shall pay the tax imposed by this section on the average wholesale price of all gallons or equivalent gallons of motor fuel used in the operation of a motor carrier within this state, under the following rules:(1) The total amount of motor fuel used in the operation of the motor carrier within this state is that proportion of the total amount of motor fuel

used in a motor carrier's operations within and without this state, that the total number of miles traveled within this state bears to the total number of miles traveled within and without this state. W. Va. Code Ann. § 11-15A-13a(c) (West 2014).

TAXATION
USE TAX
CREDIT FOR SALES TAX LIABILITY PAID TO ANOTHER STATE

(a) A person is entitled to a credit against the tax imposed by this article on the use of a particular item of tangible personal property, custom software or service equal to the amount, if any, of sales tax lawfully paid to another state for the acquisition of that property or service: *Provided*, That the amount of credit allowed does not exceed the amount of use tax imposed on the use of the property in this state. (b) For purposes of this section: (1) "Sales tax" includes a sales tax or compensating use tax imposed on the use of tangible personal property or a service by the state in which the sale occurred; and (2) "State" includes the District of Columbia but does not include any of the several territories organized by Congress. W. Va. Code Ann. § 11-15A-10a (West 2014).

OFFICE OF TAX APPEALS
CONCLUSION OF LAW

There is no authority under West Virginia law to require motor carriers to prove how much fuel they used in other states prior to seeking a credit pursuant to West Virginia Code Section 11-15A-10a. Therefore, the Tax Commissioner's insistence on such proof was arbitrary and capricious, an error of law, and clearly wrong.

WEST VIRGINIA SUPREME COURT OF APPEALS
CASE LAW

The United States Supreme Court has created a four part test to ascertain if a state taxing scheme violates the dormant Commerce Clause. The Court ruled that a tax that: (1) applies to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) is not discriminatory towards interstate or foreign commerce; and (4) is fairly related to the services provided by the State, will pass muster. Complete Auto Transit Inc. v. Brady, 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977).

WEST VIRGINIA SUPREME COURT OF APPEALS
CASE LAW

"A tax is valid under the Commerce Clause as a "compensatory tax" if the state imposes an intrastate tax such that the burdens imposed on interstate and intrastate commerce are equal. The taxpayer's out-of-pocket expenses determine whether the burdens are equal. Equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state." Arizona Dep't of Revenue v. Arizona Pub. Serv. Co., 188 Ariz. 232, 235, 934 P.2d 796, 799 (Ct. App. 1997)(internal citations omitted).

OFFICE OF TAX APPEALS
CONCLUSION OF LAW

The Tax Commissioner's denial to the Petitioner of a credit under West Virginia Code Section 11-15A-10a for taxes other than state taxes paid to other states violates the internal consistency test of the dormant Commerce Clause. As such, his denial was arbitrary and capricious, an error of law, and clearly wrong.

FINAL DECISION

On October 19, 2012, the Fuel Tax Administration Unit of the Tax Account Administration Division of the West Virginia State Tax Commissioner's Office (Tax Commissioner or Respondent) issued a Refund Denial to the Petitioner. This denial notice denied the Petitioner's request for a refund of $_____ in Motor Fuel Use Tax. On December 14, 2012, the Petitioner timely filed with this Tribunal, a petition for refund. Thereafter, on June 5, 2013, the Respondent's Auditing Division issued a Notice of Assessment against the Petitioner for motor carrier tax. The assessment was for the period January 1, 2010, through December 31, 2012, for tax in the amount of $_____, and interest in the amount of $_____, for a total assessed liability of $_____. On August 2, 2013, the Petitioner timely filed with this Tribunal, a petition for reassessment. This Tribunal later consolidated these two matters. An evidentiary hearing was held on April 30, 2014, at the conclusion of which the parties filed legal briefs. The consolidated matter became ripe for a decision at the conclusion of the briefing schedule.

FINDINGS OF FACT

1. The Petitioner is an out of State Corporation with its principal place of business in another State. The Petitioner's business is rail transportation.

2. In October of 2010, an auditor with the West Virginia State Tax Department met with a representative of the Petitioner at one of their rail yards in West Virginia. The auditor

characterized this meeting as a field audit. One of the results of this field audit was to set up the Petitioner as a fuel importer and to ensure that it began to pay tax on the fuel it was using in West Virginia.

3. Sometime afterwards, the Petitioner filed amended West Virginia Motor Fuel Use Tax Returns. In these amended returns the Petitioner was seeking a credit for sales taxes paid for locomotive fuel to cities, counties and other localities in states other than West Virginia. The Tax Commissioner determined that the Petitioner was not entitled to a credit for these taxes.

4. The process of carefully reviewing the amended returns revealed what the auditor and other Tax Department employees considered another problem within them, namely, the way the Petitioner was calculating the credit it was seeking for fuel taxes paid to other states, as opposed to cities, counties and other localities.

5. The revelation of this second perceived problem led an auditor to the Petitioner's principal place of business to conduct another field audit. During this audit the auditor reviewed documents regarding fuel purchased in other states, taxes paid on that fuel and documents showing the miles traveled in these states. The auditor used this review to recalculate how the Petitioner established the amounts of credit it was entitled to for taxes paid on fuel in other states. The auditor determined that the Petitioner had impermissibly been seeking a credit for taxes paid to other states on fuel that was not consumed in West Virginia. It was this determination that led to the June 5, 2013, assessment.

DISCUSSION

Due to the somewhat complicated nature of how locomotive fuel is taxed, we believe that a simple explanation would be beneficial before we turn to the arguments of the parties. The

Petitioner, like all Taxpayers in West Virginia, must pay a use tax on all items of tangible personal property it uses during the course of its business here. *See* W. Va. Code Ann. § 11-15A-2(a) (West 2014). The personal property at issue in this matter is fuel in the Petitioner's locomotives. Obviously, no state, including West Virginia, stops locomotives when they cross the borders to figure out how much fuel has been used in the state. Instead, the Legislature has come up with a formula to measure the usage. That formula is contained in West Virginia Code Section 11-15A-13a.

> *Computation of tax due from motor carriers*.--Every person who operates or causes to be operated a motor carrier in this state shall pay the tax imposed by this section on the average wholesale price of all gallons or equivalent gallons of motor fuel used in the operation of a motor carrier within this state, under the following rules:
>
> (1) The total amount of motor fuel used in the operation of the motor carrier within this state is that proportion of the total amount of motor fuel used in a motor carrier's operations within and without this state, that the total number of miles traveled within this state bears to the total number of miles traveled within and without this state.

W. Va. Code Ann. § 11-15A-13a(c) (West 2014).

At the evidentiary hearing in this matter the Petitioner introduced its exhibit 11, which sought to show how it applies the formula in Section 13a(c). The undersigned asked the witness to take the application of the formula a step further and apply it using simple math. This request led to the creation of Petitioner's Exhibit 12. Exhibit 12 used a fictional railroad with 10,000 miles of track nationwide and 1,000 miles of track in West Virginia, creating a 10% apportionment formula pursuant to Section 13a(c). From there, the witness calculated a fictional amount of fuel used nationwide, 200,000 gallons, and using the 10% apportionment formula found 20,000 gallons to have been deemed used in West Virginia. From there, for the most part,

the Petitioner simply applies the motor fuel tax rate to that 20,000 gallons deemed used, and pays the tax.[1]

It should be noted that the parties are in agreement regarding the process described immediately above, and how the Petitioner calculates its usage in West Virginia and pays use tax. The first disagreement between the parties concerns how the Petitioner seeks a credit for taxes paid on motor fuel purchased in other states. The ability to obtain such a credit is contained in West Virginia Code Section 11-15A-10a.

> (a) A person is entitled to a credit against the tax imposed by this article on the use of a particular item of tangible personal property, custom software or service equal to the amount, if any, of sales tax lawfully paid to another state for the acquisition of that property or service: *Provided*, That the amount of credit allowed does not exceed the amount of use tax imposed on the use of the property in this state.
>
> (b) For purposes of this section:
>
> (1) "Sales tax" includes a sales tax or compensating use tax imposed on the use of tangible personal property or a service by the state in which the sale occurred; and
>
> (2) "State" includes the District of Columbia but does not include any of the several territories organized by Congress.

W. Va. Code Ann. § 11-15A-10a (West 2014).

The dispute between the parties concerns the gallons deemed used in West Virginia, and how many of those gallons were purchased in other states and taxed. The Petitioner had, for many years prior to this litigation, been calculating the credit from Section 10a the same way it calculated usage when paying the tax, by the apportionment formula. What the Petitioner would do is figure out how many taxable gallons it had purchased nationwide and multiply by the West

[1] There are some other calculations done by the Petitioner, such as accounting for the fuel imported into West Virginia that has already been taxed on the Petitioner's importer returns. However, these calculations are not relevant to our discussion here.

Virginia apportionment formula. So, using the fictional scenario in Exhibits 11 & 12, out of the 200,000 gallons purchased, 5,000 would have been purchased in taxable states. Using the 10% apportionment factor, the Petitioner would end up with what it called 500 "taxable" or "taxed" gallons eligible for the credit in Section 10a.

The auditor who initially reviewed the Petitioner's returns and who conducted the two field audits felt that the Petitioner was calculating the credit incorrectly. The auditor was of the opinion that before the Petitioner could claim the credit in Section 10a, it would need to "prove" that the 500 gallons discussed above was actually used in West Virginia. During her field audit at the Petitioner's offices, she came up with her own methodology to figure out what the Petitioner had used. She did this by taking the six states where the Petitioner paid tax on locomotive fuel (the 5,000 gallons in our fictional scenario above) and figured out their "usage" in those states. She arrived at the other six states usage by looking at how much fuel they purchased there versus how much fuel they "used" in those states. We have "used" in quotes because she obviously could not know how much fuel was used in those states. Instead, she apparently used an apportionment formula, total miles system wide versus total miles within the state. The bottom line to these calculations was the auditor informing the Petitioner that when it came time to obtain the credit in Section 10a, it could not have used the number of gallons it claimed to have used in West Virginia because it had already "used" those gallons in other states. It was this recalculation of how the Petitioner sought the Section 10a credit that led to the $_____ assessment in this matter. At the evidentiary hearing and in post-hearing briefs the Tax Commissioner takes the position that it is axiomatic that you cannot use fuel in two different places and therefore the Petitioner must do the calculations the auditor did to prove what gallons are entitled to the Section 10a credit. We are unpersuaded by the Respondent's arguments for

two reasons. First and foremost, as mentioned above, the parties are in agreement that the Petitioner is correctly using the apportionment formula in West Virginia Code Section 11-15A-13a when it is time to pay use tax. In plain English, using our fictional numbers, the Tax Commissioner has no problem with the Petitioner paying use tax on 20,000 gallons that are deemed to have been used in West Virginia. **But**, when it's time to obtain the credit, the Tax Commissioner informs the Petitioner that it's deemed usage of 20,000 gallons is out the window. Instead, at the time of the credit a second formula is used, one that significantly lowers the Petitioner's fuel usage in West Virginia. Obviously, such a position is untenable. The Tax Commissioner cannot tell any Taxpayer, "we're going to use two amounts, when it's time to pay we'll use the higher amount, but when it's time for the credit, we'll go with the lower amount". Moreover, the Tax Commissioner has not provided this Tribunal with any authority supporting the methodology used by the auditor. The Legislature has created a formula to establish how much fuel is used in this state by motor carriers like the Petitioner. The Petitioner uses this formula both when paying the tax and when it seeks the credit. The Tax Commissioner cites no authority for deviating from this formula when calculating the credit in Section 10a.

The next argument between the parties concerns whether the Petitioner can obtain a Section 10a credit for taxes paid to cities, counties and other localities. The Tax Commissioner argues that the phrase, "paid to another state," in West Virginia Code Section 11-15A-10a (*supra)* means just what it says. The Petitioner advances a variety of arguments regarding its entitlement to the requested credits, including that the way the Tax Commissioner is applying Section 10a violates the dormant Commerce Clause. We agree with the Petitioner in this regard and therefore do not need to address the parties' other arguments regarding the phrase in question. The constitutional questions addressed by the parties are well settled. The Commerce

Clause of the United States Constitution gives Congress the power to regulate commerce. However, the courts, in particular the United States Supreme Court, have created a body of law regarding the flip side of Congress' power to regulate commerce, namely the limitations on the individual states ability to regulate/hamper interstate commerce. This body of law is referred to as the dormant Commerce Clause. One of the standard bearer cases on the dormant Commerce Clause is Complete Auto Transit Inc. v. Brady, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). The Complete Auto Court created a four part test to ascertain if a state taxing scheme violates the Clause. The Court ruled that a tax that: (1) applies to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) is not discriminatory towards interstate or foreign commerce; and (4) is fairly related to the services provided by the State, will pass muster under the dormant Commerce Clause. Id, at 279.

The Petitioner claims that the Tax Commissioner's application of West Virginia Code Section 11-15A-10a violates prong two (and to some extent, three) of the Complete Auto test.[2] It specifically argues that the Tax Commissioner's application violates the "internal consistency" test, which was first discussed by the U.S. Supreme Court in the 1980's. *See e.g.* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 103 S. Ct. 2933, 77 L. Ed. 2d 545 (1983); Am. Trucking Associations, Inc. v. Scheiner, 483 U.S. 266, 107 S. Ct. 2829, 97 L. Ed. 2d 226 (1987); Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987); Goldberg v. Sweet, 488 U.S. 252, 109 S. Ct. 582, 102 L. Ed. 2d 607 (1989). The test states that "[T]o be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result." Goldberg, at

[2] We should point out that the Petitioner is not claiming that West Virginia Code Section 11-15-10a is unconstitutional, just that it is being applied to the Petitioner in an unconstitutional manner. As a result, this Tribunal is capable of ruling on this question without raising separation of powers questions. *See* Docket Nos. 12-192 RSW & 12-193 RSW.

261, 589. The Petitioner claims that it is subject to multiple taxation by its inability to obtain a credit, under Section 10a, for non-state taxes paid in other states.

The Petitioner relies on a variety of cases to discuss both the dormant Commerce Clause in general and how it believes the Tax Commissioner has violated it in this case. We believe two of the cases cited by the Petitioner provide helpful analysis. The first is Arizona Dep't of Revenue v. Arizona Pub. Serv. Co., 188 Ariz. 232, 934 P.2d 796 (Ct. App. 1997). There, an Arizona utility was using coal purchased in New Mexico and paying that state's gross receipts taxes, resources excise taxes and severance taxes for a total tax rate of 5.25%. When the utility sought a credit for these taxes the Arizona Department of Revenue allowed credit for the gross receipts taxes but not for the other taxes. The Court of Appeals of Arizona first discussed the jurisprudence of fair apportionment under the Clause and the internal consistency test.

> State use taxes typically apply only to the use of goods purchased outside the taxing state and brought into it. A use tax thus inherently discriminates against interstate commerce. Nevertheless, such a tax is valid under the Commerce Clause as a "compensatory tax" if the state imposes an intrastate tax such that the burdens imposed on interstate and intrastate commerce are equal. The taxpayer's out-of-pocket expenses determine whether the burdens are equal. Equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state.

Arizona Dep't of Revenue v. Arizona Pub. Serv. Co., 188 Ariz. 232, 235, 934 P.2d 796, 799 (Ct. App. 1997)(internal citations omitted). After this analysis, the Court just used simple math to explain its ruling that the Arizona Department of Revenue had violated the internal consistency test. If an Arizona company bought coal in Arizona it would pay a 5% sales tax. By Arizona's refusal to provide a credit for all of the taxes paid, the utility at the center of the litigation ended up paying a total of 5.25% in taxes for the same amount of coal, hence the violation of the test.

Interestingly, in footnotes, both parties discuss a recent case from Maryland. We say interestingly for two reasons, first the dueling footnotes, indicating that neither party finds the case to be highly determinative, secondly because in May of 2014, the U.S. Supreme Court granted certiorari. Despite the fact that it is an income tax case, we find Comptroller of the Treasury of Maryland v. Wynne, 431 Md. 147, 64 A.3d 453 (2013) cert. granted, 134 S. Ct. 2660, 189 L. Ed. 2d 208 (U.S. 2014) to be as helpful to our determination as Arizona Dep't of Revenue. In Wynne, Maryland residents had complaints similar to those of the utility in Arizona. These residents were entitled to a credit against the Maryland state income tax for taxes paid on income generated in other states; however they were not entitled to a credit against Maryland's county taxes on that same income. The Court of Appeals of Maryland undertook an analysis almost identical to that undertaken in Arizona. It created two fictional Maryland residents, one who earned $100,000 solely in Maryland and one who earned $50,000 in Maryland and $50,000 in Pennsylvania. Before any credits, both owed identical amounts of Maryland income tax. Again, simple math showed that the resident with multi-state income who was not able to obtain a credit against all the taxes paid in Pennsylvania had a net tax bill higher than the comparable resident, with another corresponding violation of the internal consistency test and the Clause. We find the Wynne case to be determinative precisely because it is a quite recent, clear and cogent analysis of the internal consistency test. We find it interesting because the U.S. Supreme Court granted certiorari.

In their initial brief, the Petitioner connects the dots in similar fashion to the Wynne and Arizona Dep't of Revenue Courts and creates two fictional entities using fuel in this state, one having purchased the fuel in West Virginia and one purchasing fuel elsewhere. Once again, simple math shows that under the Tax Commissioner's application of West Virginia Code

Section 11-15A-10a, the company purchasing fuel in states with taxes other than just state taxes will pay more for using the same product in West Virginia.[3]

The Tax Commissioner offers no clear rebuttal to the Petitioner's argument in this regard, merely stating that "[T]he Constitutionality of West Virginia's law cannot depend upon taxes imposed by other jurisdictions." *See* "West Virginia State Tax Commissioner's Reply to Petitioner's Post-Hearing Brief." p. 8. The Tax Commissioner cites Armco Inc. v. Hardesty, 467 U.S. 638, 104 S. Ct. 2620, 81 L. Ed. 2d 540 (1984) as standing for this proposition. What the Armco Court actually said was "[A]ny other rule would mean that the constitutionality of West Virginia's tax laws would depend on the shifting complexities of the tax codes of 49 other States, and that the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated". Id, at 644-45, 2623-24. The "rule" the Armco, Court was speaking of was the internal consistency test and the decision reaffirmed the Court's acceptance of it. To the extent the Tax Commissioner relies on Armco for the proposition that West Virginia need not worry about the taxing schemes in other states, we disagree. In actuality, the Armco Court did exactly what the courts in Maryland and Arizona would do many years later, it applied simple math to compare the tax bills of identically situated Taxpayers. In Armco, like Wynne and Arizona Dep't of Revenue unequal tax bills violated the internal consistency test and therefore, the dormant Commerce Clause.

In summation, we are aware that the U.S. Supreme Court will be hearing the Wynne case in the near future and that the scope of the dormant Commerce Clause may well change.

[3] The math is so simple we feel no need to clutter the decision with it. Using fictional numbers, if two West Virginia motor carriers travel identical miles and both use a gallon of fuel, one of the gallons purchased in West Virginia and the other purchased in a state with a 4% state sales tax and 2% county tax the carrier using the fuel in West Virginia will pay 6% and the other carrier will pay 6% to the other state but only obtain a credit of 4% with an ensuing extra out of pocket expense of 2%.

However, as the law of the United States stands today, we are of the opinion that the Tax Commissioner has applied West Virginia's use tax to the Petitioner here in a manner that violates the dormant Commerce Clause because its application is not fairly apportioned and discriminates against interstate commerce.

CONCLUSIONS OF LAW

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. §11-1-2 (West 2010).

2. "The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable." W. Va. Code Ann. § 11-10-11(a) (West 2010).

3. "An excise tax is hereby levied and imposed on the use in this state of tangible personal property, custom software or taxable services, to be collected and paid as provided in this article or article fifteen-b of this chapter, at the rate of six percent of the purchase price of the property or taxable services, except as otherwise provided in this article." W. Va. Code Ann. § 11-15A-2(a) (West 2014).

4. *Computation of tax due from motor carriers*.--Every person who operates or causes to be operated a motor carrier in this state shall pay the tax imposed by this section on the average wholesale price of all gallons or equivalent gallons of motor fuel used in the operation of a motor carrier within this state, under the following rules: (1) The total amount of motor fuel used in the operation of the motor carrier within this state is that proportion of the total amount of motor fuel used in a motor carrier's operations within and without this state, that the total

number of miles traveled within this state bears to the total number of miles traveled within and without this state. W. Va. Code Ann. § 11-15A-13a(c) (West 2014).

5. (a) A person is entitled to a credit against the tax imposed by this article on the use of a particular item of tangible personal property, custom software or service equal to the amount, if any, of sales tax lawfully paid to another state for the acquisition of that property or service: *Provided*, That the amount of credit allowed does not exceed the amount of use tax imposed on the use of the property in this state. (b) For purposes of this section: (1) "Sales tax" includes a sales tax or compensating use tax imposed on the use of tangible personal property or a service by the state in which the sale occurred; and (2) "State" includes the District of Columbia but does not include any of the several territories organized by Congress. W. Va. Code Ann. § 11-15A-10a (West 2014).

6. There is no authority under West Virginia law to require motor carriers to prove how much fuel they used in other states prior to seeking a credit pursuant to West Virginia Code Section 11-15A-10a. Therefore, the Tax Commissioner's insistence on such proof was arbitrary and capricious, an error of law, and clearly wrong.

7. The United States Supreme Court has created a four part test to ascertain if a state taxing scheme violates the dormant Commerce Clause. The Court ruled that a tax that: (1) applies to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) is not discriminatory towards interstate or foreign commerce; and (4) is fairly related to the services provided by the State, will pass muster. Complete Auto Transit Inc. v. Brady, 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977).

8. "A tax is valid under the Commerce Clause as a "compensatory tax" if the state imposes an intrastate tax such that the burdens imposed on interstate and intrastate commerce are

equal. The taxpayer's out-of-pocket expenses determine whether the burdens are equal. Equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state." Arizona Dep't of Revenue v. Arizona Pub. Serv. Co., 188 Ariz. 232, 235, 934 P.2d 796, 799 (Ct. App. 1997)(internal citations omitted).

9. The Tax Commissioner's denial to the Petitioner of a credit under West Virginia Code Section 11-15A-10a for taxes other than state taxes paid to other states violates the internal consistency test of the dormant Commerce Clause. As such, his denial was arbitrary and capricious, an error of law, and clearly wrong.

DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that the Petitioner's refund request for $_____ of Motor Fuel Use Tax should be and hereby is **GRANTED** and that the assessment, issued on June 5, 2013 for motor carrier taxes for a total liability of $_____ is hereby **VACATED.**

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
A. M. "Fenway" Pollack
Chief Administrative Law Judge

_____
Date Entered